No. 84-778

IN THE

Supreme Court of the United States

October Term, 1984

STATE OF MARYLAND,

Petitioner,

v.

BAXTER MACON,

Respondent.

On Writ of Certiorari to the Court of Special Appeals of Maryland

BRIEF OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., MOTION PICTURE ASSOCIATION OF AMERICA, INC., NATIONAL ASSOCIATION OF COLLEGE STORES, INC., AND THE FREEDOM TO READ FOUNDATION, AS *AMICI CURIAE*, IN SUPPORT OF RESPONDENT

MICHAEL A. BAMBERGER
Attorney for *Amici Curiae*
425 Park Avenue
New York, New York 10022
(212) 371-5900

SHIRLEY ADELSON SIEGEL
DAVID C. BURGER

FINLEY, KUMBLE, WAGNER, HEINE,
UNDERBERG, MANLEY & CASEY
Of Counsel

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STATEMENT

The American Booksellers Association, Inc.; the Association of American Publishers, Inc.; the Council for Periodical Distributors Associations; the International Periodical Distributors Association, Inc.; the Motion Picture Association of America, Inc.; the National Association of College Stores, Inc.; and The Freedom to Read Foundation (collectively referred to as *"Amici"*) submit this joint brief *amici curiae,* pursuant to Rule 42 of the Rules of the Supreme Court of the United States, in support of respondent. This joint brief is submitted upon the written consent of both petitioner and respondent.[1]

The *Amici*

The *amici*'s members publish, produce, distribute, sell and lend books, magazines, other printed materials of all types, and motion pictures, including those which are scholarly, literary, scientific and entertaining.

The American Booksellers Association, Inc. (ABA) is a trade association organized under the laws of the State of New York. It is the major national association of booksellers in the United States. ABA has approximately 5,200 members consisting of private book stores, department book stores, university book stores and chain book stores.

The Association of American Publishers, Inc. (AAP) is a trade association organized under the laws of the State

[1] The original of petitioner's written consent by the Attorney General of Maryland has previously been filed with this Court. The original of respondent's written consent by his counsel Burton Sandler is being filed herewith.

of New York. It is a major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately three hundred and twenty-five members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of all general, educational and religious books and materials produced in the United States. These works are sold and distributed in all fifty states to schools, universities and libraries and through thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities.

The Council for Periodical Distributors Associations is an Illinois not-for-profit corporation. It is the national trade association for over five hundred independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state of the United States.

The International Periodical Distributors Association, Inc. is a trade association organized under the laws of the State of New York. It is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The Motion Picture Association of America, Inc. (MPAA) is a trade association whose members are among the leading producers and distributors of motion pictures

in the United States. All of MPAA's member companies engage in the production and distribution of motion pictures for exhibition in motion picture theaters.

The National Association of College Stores, Inc. is a trade association composed of approximately 2,300 college stores located throughout the United States.

The Freedom to Read Foundation, a non-profit organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions wherein every citizen's First Amendment freedoms are fulfilled; to support the right of libraries to include in their collections and make available any work which they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens.

Interest of the *Amici*

The *amici* are all involved in some aspect of making reading material and motion pictures of all kinds available to the general public. For this reason, the *amici* have a continuing interest in the decisions of this Court involving the balancing of First Amendment rights, and restrictions on materials with sexual content, including obscene materials not protected by the First Amendment. The *amici*'s brief will indicate the impact of the legal principles involved upon those who produce, distribute, sell, exhibit and lend material which is not obscene. The *amici* have brought the same perspective to the Court in previous cases. *E.g., Brockett* v. *Spokane Arcades, Inc.,* Nos. 84-28 and 84-143, October Term, 1984; *Vance* v. *Universal Amuse-*

ment Co., 445 U.S. 308 (1980); *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319 (1979). The *amici* have learned from experience that, in an eagerness to attack the social harms perceived to stem from the prevalence and accessibility of sexually-related materials, state and city legislators and enforcement agencies frequently treat legitimate constitutionally-protected books, periodicals and motion pictures identically with those materials which are obscene and not protected. Unless the constitutionally mandated distinction is maintained, First Amendment rights may be threatened and curtailed.

ARGUMENT

THE FIRST AMENDMENT PROHIBITS THE COMMENCEMENT OF CRIMINAL CHARGES ON THE BASIS OF A POLICE OFFICER'S PERSONAL INTERPRETATION OF THE OBSCENITY LAW.

Whether the purchase of magazines in this case was a "seizure" cannot be addressed except in the context of the First Amendment, for the ultimate question before the Court is whether a police officer may be the personal arbiter of what a bookstore may sell.

In the briefs of the petitioner and Solicitor General, the nice legal issue of whether a purchase is a "seizure" under the Fourth Amendment is so inflated that it completely overshadows and distorts the critical First Amendment issue in this case. The unlawful conduct commenced when the police officers took it upon themselves, contrary to all precedent of this Court, personally to decide whether the purchased magazines were obscene. Any and all conduct

based on that unlawful determination is in violation of the First, Fourth and Fourteenth Amendments. The First and Fourteenth Amendments do not countenance the commencement of criminal obscenity charges on the basis of the "hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime." *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 326 (1979), quoting *Johnson* v. *United States*, 333 U.S. 10, 14 (1948). A neutral and detached magistrate must focus searchingly on the question of obscenity before materials in a setting presumptively under First Amendment protection may provide the predicate for criminal obscenity charges. *Lo-Ji Sales, Inc.* v. *New York, supra; Roaden* v. *Kentucky*, 413 U.S. 496 (1973); *Lee Art Theatre* v. *Virginia*, 392 U.S. 636 (1968); *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961).

The petitioner and the Solicitor General cite numerous cases analyzing the Fourth Amendment in factual contexts that do not implicate the First Amendment. These cases are simply inapposite. Because of the unique status given to the First Amendment in the panoply of rights granted by the United States Constitution, *e.g.*, *NAACP* v. *Button*, 371 U.S. 415 (1963), the interplay of the First and Fourth Amendments has given rise to special requirements governing state action that has the direct or indirect effect of restricting protected expression.

This Court has ruled that police officers may not seize publications or films in a setting presumptively protected under the First Amendment without a prior determination of obscenity by a neutral and detached magistrate. *Roaden* v. *Kentucky, supra*. In the case presently before this Court,

the magazines were purchased by the officers who then commenced criminal charges based only upon their personal interpretation of obscenity. The petitioner and the Solicitor General argue that the purchase was not a "seizure" under the Fourth Amendment and therefore that the First Amendment concerns animating this Court's decision in *Roaden* are irrelevant here.

Does the payment of $12.00 by the officer in this case render the First Amendment guarantees void and of no value? Certainly this Court's requirement that obscenity be determined by a magistrate cannot so easily be short-circuited.

The officers' unlawful determination of obscenity is the source of the unlawful seizure of the clerk and the constructive seizure of the entire contents of the bookstore, and gives rise to a chilling effect upon all who do not wish to have their customers ushered out, have their stores and theaters closed, and be led away in handcuffs.

The closing of the bookstore and the ushering out of customers was a clear prior restraint in violation of the First Amendment and due process. The Solicitor General asserts that this prior restraint was "purely fortuitous" and a mere "incidental effect" that can have no legitimate bearing on the decision of this case. Brief of the Solicitor General, at 16-17.

This Court has never recognized a "Fortuity Exception" to the First Amendment.

The chilling effect on *any* bookseller or film exhibitor of the mere threat that a police officer could commence criminal charges based on his personal judgment of obscenity must not be underestimated. This Court may take judicial notice of the fact that bookstores stock thousands of different titles at any given time; the economic incentive to keep any single title in stock is vastly outweighed by even the slightest threat of criminal charges based on the sale of that title.[2] The sale of periodicals is often a sideline for a merchant and therefore is even more susceptible to the chilling event caused by such a threat. Similarly, a film exhibitor will capitulate in the face of a threat of criminal action. Maxwell J. Lillienstein, counsel for the American Booksellers Association, has warned such chilling effects:

> "will constitute a serious blow to the right of Americans to publish, distribute, and read constitutionally protected materials."[3]

Petitioner claims that police officers may rely upon their own personal interpretation of obscenity to determine when criminal obscenity charges may be commenced. In support of this notion, petitioner cites this Court's footnote remark in *Miller* that it is not constitutional error for a trial court to admit expert testimony by a police officer on the issue of community standards. *Miller* v. *California*, 413 U.S. 15, 31 n.12 (1973). Having a police officer testify in aid of a judicial determination of obscenity, however, is wholly different from allowing the police to proceed on

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[2] "Since the average retailer or wholesaler of books and magazines carries thousands of titles at any given time, the removal of a single title will not cause him serious monetary loss." Lillienstein, *"Human Rights" vs. the First Amendment,* American Bookseller, June 1984 at 29.

[3] *Ibid.*

their own authority. This difference was highlighted four days after *Miller* was decided when this Court handed down its opinion in *Roaden* v. *Kentucky, supra,* reaffirming the requirement that a neutral and detached magistrate must render the determination as to whether there is probable cause to commence criminal obscenity charges. The *Miller* footnote cannot be contorted to impugn the longstanding holdings of this Court requiring judicial determination of obscenity before criminal charges may be brought. *Lo-Ji Sales, Inc.* v. *New York, supra, Roaden* v. *Kentucky, supra; Lee Art Theatre* v. *Virginia, supra; Marcus* v. *Search Warrant, supra.* Those holdings acknowledge the constitutional imperative that producers, distributors and retailers of material presumptively protected by the First Amendment shall not operate in fear of criminal obscenity charges being commenced upon the personal interpretation and whim of any police officer.

> "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn . . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . . ."

Bantam Books v. *Sullivan,* 372 U.S. 58, 66 (1963), quoting *Speiser* v. *Randall,* 357 U.S. 513, 525 (1958). Even the obscenity determination of a Town Justice is constitutionally deficient when he fails to manifest the requisite neutral and detached nature. *Lo-Ji Sales, Inc.* v. *New York, supra.*

A limited confiscation of allegedly obscene material for the bona fide purpose of preserving it as evidence in a criminal proceeding does not require a prior adversary hearing on the question of obscenity *when the imposition of criminal charges is based on a magistrate's finding of*

probable cause. Lo-Ji Sales, Inc. v. *New York,* 442 U.S. at 327-28; *Heller* v. *New York,* 413 U.S. 483, 491-93 (1973).

The threat of commencement of criminal charges without prior judicial determination of obscenity effects a prior restraint in violation of the First and Fourteenth Amendments. The Solicitor General's remarks, that "a police officer's determination that a particular book or film is obscene will not go unreviewed by a court," is of little comfort. Brief of the Solicitor General, at 17. Given the choice between cleansing their stock to suit the tastes of the local police, or suffering the ignominy and expense of being charged with an obscenity crime, businessmen will capitulate. The fact that wrongful charges will be dropped after judicial review is insufficient to counteract the chilling effect.

The pattern and practice of police conduct here was calculated to harass and hinder the sale of material that was presumptively protected by the First Amendment unless and until a magistrate determined otherwise. The petitioner remarks in a footnote that "other clerks had been arrested earlier in the day at Silver News, obviously not preventing its operation by Respondent." Petitioner's Brief, at 41 n.11. Multiple, separate obscenity arrests of clerks in a bookstore on a single day indicate an intent to intimidate and harass.

The repeated harassment of the Silver News bookstore was part of a wholesale effort by the police to intimidate bookstores selling allegedly obscene material. Arrest warrants were obtained in some cases, but not in others. The petitioner states that the warrantless arrests of "defendant Bell" and an unnamed defendant were necessary due to "identification problems." Petitioner's Brief, at 6 n.3.

It is unnecessary to address the sufficiency of this explanation since *no reason at all* is stated to justify the warrantless arrest of respondent. A warrantless obscenity arrest is itself a prior restraint because it violates due process and imparts a chilling effect on the distribution of material presumptively entitled to First Amendment protection.[4]

Looking "through forms to the substance," the pattern of police conduct depicted in this case "plainly serv[s] as [an] instrument[ ] of regulation independent of the laws against obscenity." *Bantam Books* v. *Sullivan,* 372 U.S. at 67, 69. Imposition of criminal obscenity charges on the basis of an extra-judicial determination of probable cause renders First Amendment protections nugatory.

In *Bantam Books, supra,* this Court struck down as violative of the First Amendment a censorship scheme that involved no warrants, no confiscation of books, no closures of stores, no ushering out of customers and no arrests. The police tactics in the case *sub judice* have a far more frigid chilling effect than the conduct in *Bantam Books.* Because of the chilling effect of such tactics,[5] the warrantless arrests made by the police in this case should be treated as seizures with all the safeguards that are accorded to seizures of material presumptively under First Amendment protection.

The rationale for excluding evidence that is improperly utilized for a criminal prosecution is to deter police misconduct. *United States* v. *Leon,* 468 U.S. ——, 82 L.Ed.2d

[4] *Cf. Penthouse Int'l Ltd.* v. *McAuliffe,* 610 F.2d 1353, 1361 (5th Cir. 1980) ("Because [the police] activities constituted a calculated scheme of warrantless arrests and harassing visits to retailers, we must conclude that the *substance* of the procedures . . . created an informal system of prior restraint").

[5] *See supra* p. 7.

677 (1984). The police misconduct here is palpable and unmistakable. The decisions of this Court clearly mandate that a neutral and detached magistrate determine whether there is probable cause for the imposition of criminal obscenity charges. The police rankly disregarded this mandate and proceeded on their personal judgment as to what a bookstore may sell. Evidence for which the requisite judicial determination of probable cause was not obtained, must be suppressed. Any other result will constrict the availability of First Amendment protected materials to conform with the personal judgment of the local police.

CONCLUSION

For the reasons set forth above, we respectfully urge this Court to uphold the long line of precedents requiring a judicial determination of obscenity before criminal charges may be imposed and to affirm the order of the Maryland Court of Special Appeals.

Respectfully submitted,

MICHAEL A. BAMBERGER
425 Park Avenue
New York, New York 10022
Attorney for *Amici Curiae*
American Booksellers Association Inc., Association of American Publishers, Inc., Council for Periodical Distributors Associations, International Periodical Distributors Association, Inc., Motion Picture Association of America, Inc., National Association of College Stores, Inc., and The Freedom to Read Foundation.

SHIRLEY ADELSON SIEGEL
DAVID C. BURGER

FINLEY, KUMBLE, WAGNER, HEINE,
UNDERBERG, MANLEY & CASEY
Of Counsel